Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ROBERT RICHARDSON
PETITIONER

VS.

BAKERY, CONFECTIONERY,
& TOBACCO UNION, LOCAL 26
RESPONDENT

ON PETITION FOR A WRITE OF CERTIORARI TO

TENTH CIRCUIT COURT

PETITION FOR WRIT OF CERTIORARI

ROBERT RICHARDSON
3545 BIRNAMWOOD DRIVE
COLORADO SPRINGS, CO 80920
(719)282-0568

QUESTION(S) PRESENTED

1. How can the Court of Appeals grant a summary judgement on a statutory rights and drop a violation of Title VII?

2. How can the Court of Appeals affirm a grant or Motion for Summary Judgment by the District Court, when the courts did not look at (Rule 56 (A)(B)(C)(E) (F)(G), as well as Rule (12(U))?

3. How can the Court of Appeals affirm the recommendation of Abram Magistrate Judge, when the recommendation is in conflict with the decision of Celotex Corp. v. Catrett 477 US 317, 912Ed 2d 265, 106 S Ct 2548 and Rule (56^{S})?

4. How can the Court of Appeals affirm the recommendation of Abram Magistrate Judge, when his recommendation is in conflict with his own minute sheet?

5. How can the Court of Appeals affirm the recommendation of Abram Magistrate Judge, when his recommendation is (Rule 72(B)) under Deposition Motions and prisoner petitions, but when this is a civil case?

6. How can the Court of Appeals affirm the recommendation of Abram Magistrate Judge, when the recommendation is in violation of Rule 73(B) of Fed. Rule?

7. How can the Court of Appeals affirm that the complaint was untimely filed, when there is no evidence indicating when the EEOC sent the determination letter to the plaintiffs or when the plaintiffs received the determination letter?

8. How can the Court of Appeals affirm what the Plaintiff refused to provide adequate responses to discovery requested by the Defendant and ordered by the court on September 28, 1995, when records show that the discovery was closed on September 22, 1995?

9. How can the Court of Appeals affirm that the Plaintiff needed to establish a prima facie when there was no full discovery or trial?

10. How can the Court of Appeals affirm that the Plaintiff was not treated differently than whites who were in a similar situation, when the Plaintiff's witnesses were never questioned by the Defendant?

11. How can the Court of Appeals affirm that the Defendant has sufficiently demonstrated a legitimate nondiscriminatory reason for abandoning the Plaintiff's grievance, against Albertson's when there are no full discoveries, no trial, and no witness testimony on the Plaintiff's side?

12. How can the Court of Appeals affirm that the Plaintiff did not respond to the Defendant's Motion for Summary Judgment or Motion for Dismissal, when the records show that the Plaintiff did not have adequate time to address the Summary Judgment or Motion for Dismissal? The courts did not give the Plaintiff the necessary time under Rule (56^S).

13. How can the Court of Appeals affirm this order and judgment cited under the terms and conditions of the 10th Cir R 36.3., when the District Court made a decision under (Rule 56^S) and Fed R Cir P 72(B)?

14. How can the courts affirm a Summary Judgment, when the records show appellant did cooperate with the courts?

15. How can the Court of Appeals affirm a Summary Judgment, when it did not look at the Court Records or at the appellant's brief or evidence?

16. How can the Court of Appeals affirm appellee did not shift the burden of evidence under Rule 301(8)(9)(10)(11)(12)?

17. What is a Union contract and how should a grievance and arbitration work? Who is entitled under the Union contract to have a grievance or arbitration?

18. How can a Union drop a member, when the member has paid his dues? Isn't he entitled to be represented by the Union?

19. How can a person use his sick leave that has been earned? How can a person use his accumulated sick hours under a Union contract, and what is a bona fide illness or sick leave?

20. How can four white co-workers make a statement that is inconsistent and not true against a Black Union member and the Union drop the Black Union member's grievance? Why did the Union not represent the Black Union member?

21. How can the Union drop a member from the Union contract or not represent a member who has a grievance? By what authority can the Union do this?

22. How can the Courts affirm a Summary Judgment on a genuine issue, when it is not between the Plaintiff and the Defendant but others?

All parties appear in the caption of the case on the cover page.

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14. Vincent L. Pryner vs. Tractor Supply Company Inc. cited as 927F. Supp. 1140	1140-1148
15. Rotas vs. Waterman Broadcasting cited as 927 F Supp 1547 (M.D. Fla 1996)	1547-1554

STATUTES AND RULES

Rule 56[S]
Rule 301
Rule 37, 73, 72
Rule 26, 36, 33
Bakery Agreement between Albertson's Inc. and Bakery, Confectionery & Tobacco Worker's International Union Local #26, Denver, Colorado, Article 12 and 21

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. S 706(f) of Title VII of the Civil Rights Act of 1964, 42 U.S.C S2000E-5(f) 28 U.S.C.

2. 5706 (f) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000 E-5(f) 28 U.S.C. S 1991(c).

3. Rule 56[S]

4. Rule 301

5. Rule 26, 33, 36, 37, 73, and 72

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

PETITION FOR WRITE OF CERTIORARI

OPINIONS BELOW

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

The opinion of the United States court of appeals appears at Appendix A to the petition and is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is unpublished.

The date on which the United States Court of Appeals decided my case was July 29, 1996. A timely petition for rehearing was denied by the United States Court of Appeals on September 16, 1996, and a copy of the order denying rehearing appears at Appendix C.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. S 706(f) of Title VII of the Civil Rights Act of 1964, 42 U.S.C S2000E-5(f) 28 U.S.C.

2. 5706 (f) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000 E-5(f) 28 U.S.C. S 1991(c).

3. Rule 56[S]

4. Rule 301

5. Rule 26, 33, 36, 37, 73, and 72

STATEMENT OF THE CASE

On June 23, 1992, Plaintiff filed a grievance against his employer. As of June 2, 1992, when Plaintiff first left work due to his asthma, he had accumulated 248 hours of sick leave, pursuant to Albertson's policies. Plaintiff was prevented by Albertson's from returning to work on June 5, 1992 because of Plaintiff's inability to produce a doctor's statement verifying his illness, despite the fact that the Plaintiff had a 48-hour grace period after returning to work in which to supply the verification. The company's policies state that a person needs a doctor's statement after three days absence from work. Albertson's had prior knowledge of Plaintiff's asthma condition. The Plaintiff was subsequently not represented by Defendant but other whites were represented by Defendants.

The Plaintiff only took off one day.

REASONS FOR GRANTING THE PETITION

The courts did not prove whether or not the Defendant met all the requirements under Fed Rules of Civil Process (Rule 56[S]) to be granted a Summary Judgment. When the Court of Appeals Tenth Circuit affirmed the lower court order and judgment, it came in conflict with (1) [Rule 56[S] and Celotex Corp. vs Catrett], (2) Pryner vs. Tractor Supply Co., Inc., and (3) it came in conflict with all the Federal civil procedures of the Supreme Court further clarified the scope of Federal rules of civil procedures [56 in Celotex Corp. vs. Catrett, 477 US 317, 106 S Ct 2548, 91 2 Ed 2d 265 (1986) and Pryner vs. Tractor Supply Co., Inc. (cited as 927 F Supp 1140 (SD Ind 1996)]. This petition must be granted because the lower court is in conflict with the statutory rights and over the constitutional rights, such as in the case of [Pryner vs. Tractor Supply Co. Inc. state: while an individual may surrender any of his or her statutory rights unless Congress has expressed the intent that a particular right cannot be surrendered, in the context of a collective bargaining agreement, the rights at issue are solely those articulated within the confines of the agreement itself. In other words, while an individual employment contract can address both contractual and statutory rights, a collective bargaining agreement, by its very nature, may only address the contractual right of the members of the bargaining unit "Thus the arbitrator has authority to resolve only questions of contractual rights, and this authority remains regardless of whether certain contractual rights are similar to, or duplicative of the substantive rights secured by Title VII." When Courts grant the Summary Judgment on the basis of fine reasons stated

in the Tenth Circuit, it comes in conflict with the Supreme Court on the fact that statutory rights cannot rule over a substantive right secured by Title VII.] The Defendant's genuine issue was not with the Plaintiff but others. In the rule, the genuine issue would have to be between the Defendant and Plaintiff, not others.

CONCLUSION

The Defendant's Motion for a Summary Judgment should be denied because a statutory right cannot overrule a Title VII. The statutory right supports the pretext of discrimination. The Defendant did not want to challenge a white company on the behalf of a Black member. The Defendant dropped the grievance, when four white Defendant members made statements that were not true and canceled out Plaintiff's right to be represented. White Defendant members have done the same and were represented by the Defendant. The Plaintiff was denied representation because Plaintiff is Black.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Robert L. Richardson

Robert L. Richardson

Date: ~~25 Nov. 1996~~

29 Jan 1997

APPENDIX A

UNITED STATES COURT OF APPEALS

Filed 7/29/96

TENTH CIRCUIT

ROBERT RICHARDSON, Plaintiff-Appellant, v. BAKERY, CONFECTIONARY & TOBACCO WORKERS, LOCAL NO. 26, Defendant-Appellee.	No. 95-1518 (D.C. No. 95-S-679) (D. Colorado)

ORDER AND JUDGMENT[1]

Before **BRORBY, EBEL** and **HENRY, Circuit Judges.**

After examining the briefs and appellate record, this panel has determined unanimously that oral argument

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[1] This order and judgment is not binding precedent except under the doctrines of law of the case, *res judicata* and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, the order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. Therefore the appellee's motion to decide the case without oral argument is granted.

Pro se appellant Robert Richardson brings this appeal challenging the dismissal of his claims of racial discrimination brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1981. We affirm.

Mr. Richardson is an African-American member of the Bakery, Confectionary & Tobacco Workers, Local No. 26 (the "Union"). He claims the Union discriminated against him on the basis of his race when it failed to represent him in a grievance for wrongful termination against his former employer, Albertson's, Inc.[2] The district court granted the Union's motion for summary judgment for five reasons:

> First, the Plaintiff's complaint is untimely. The evidence indicates that the Plaintiff filed his complaint beyond the 90-day time limit after receiving the EEOC's determination on his charge of discrimination. Other than his conclusory allegations, the Plaintiff has provided no evidence to the contrary.
>
> Second, the Plaintiff has failed to prosecute this case and has refused to provide adequate responses to discovery requested by the Defendant and ordered by

---

[2] We recently affirmed the district court's dismissal of Mr. Richardson's separate lawsuit against Albertson's. *Richardson v. Albertson's, Inc.*, No. 96-1036, slip op. (10th Cir. July 29, 1996).

the court on September 28, 1995 ...

Third, the Plaintiff has not established a prima facie case for discrimination under Title VII or § 1981. There is absolutely no evidence that the Plaintiff was treated differently than anyone who was similarly situated.

Fourth, the Defendant has sufficiently demonstrated a legitimate nondiscriminatory reason for abandoning the Plaintiff's grievance against Albertson's.

Fifth, the Plaintiff has not demonstrated that the Defendant's nondiscriminatory reason for discontinuing the Plaintiff's grievance was actually a pretext for discrimination. Other than bare conclusory allegations set forth in the complaint, the Plaintiff has presented no evidentiary support for his claims. The Plaintiff did not file any responses to the Defendant's motion for summary judgment or motion for dismissal. The Plaintiff's answer to the Magistrate Judge's recommendation states merely general conclusory denials of the Defendant's evidence.

Mr. Richardson raises two issues on appeal. First, Mr. Richardson claims "[t]he District Court was prejudice[d] when making the decision on the Summary Judgment. The issue is the District Court only reviewed the Defendant Summary Judgment but failed to request the Plaintiff to response [sic] to Defendant Summary Judgment. Therefore the decision was prejudice." This issue is without merit. It was up to Mr. Richardson to respond to the Union's motion for Summary Judgment. There is no requirement nor basis for the position that he had to wait for the district court to order him to do so. He also has not alleged that he was unable to do so or was

unaware of the Union's motion. Furthermore, Mr. Richardson did write a response to the Magistrate's recommendation to grant the Union's motion which response begins "Plaintiff will state the facts to support why the Summary Judgment should not be granted." The record reflects the district court considered his response before ruling. The district court in no way denied Mr. Richardson a chance to respond to the Union's motion nor demonstrated any prejudice against him in making its decision.

It is hard to decipher his second issue. Applying a very liberal reading to his brief,[3] he appears to contend that under Fed. R. Civ. P. 56 the Union did not fully meet its burden of showing there was no genuine issue of material fact and that there was no evidence to support Mr. Richardson's claims. For purposes of this appeal, we will assume Mr. Richardson established a prima facie case of racial discrimination pursuant to *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973). It was then up to the Union to rebut the presumption of discrimination by showing a nondiscriminatory reason for its actions. *Drake v. City of Fort Collins*, 927 F.2d 1156, 1160 (10th Cir. 1991). These reasons "must be clear and reasonably specific." *Id.* Once this is done, the presumption of discrimination "simply drops out of the picture." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993). In this case, the Union presented undisputed evidence that it represented Mr. Richardson in the matter for over a year until when finally faced with lack of cooperation from Mr. Richardson and persuasive evidence from Albertson's it decided to drop his grievance. The Union began its

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[3] We construe the pleadings of pro se parties liberally. *Haines v. Kerner*, 404 U.S. 519 (1972).

representation by writing a letter to Albertson's asking why it had fired Mr. Richardson. The Union continued to pursue action against Albertson's despite Mr. Richardson's failure to respond to its requests for information. Eight months into the process, the Union wrote to Mr. Richardson and told him it needed some concrete information to support his claims before it could proceed any further on his behalf. Two weeks later, after still not receiving any supporting evidence from Mr. Richardson, the Union notified him it would not proceed with his case. The Union, however, did not formally withdraw its complaint against Albertson's until nearly five months later when it received a letter from Albertson's which,

> with the accompanying co-worker witness statements on record against the Appellant, made it clear that in order to prove the Appellant's case, the Appellee would have to prove that four other members of the bargaining unit were lying. Moreover, the Appellee would have to impeach the credibility of these co-workers without the Appellant himself having provided any information of any sort to confirm his story.

Mr. Richardson does not refute the Union's contention that he failed to cooperate with it by providing any evidence to support his claims nor has he presented any evidence to show the Albertson's letter to be unreliable. He also does not provide any evidence showing any intentional discrimination against him or that he was treated differently than non-minority union members. He simply alleges that the Union failed to represent him because he is black and claims the Union failed to furnish any documents showing that another member in the same situation had been treated similarly. Mr. Richardson fails to understand who bears what burden. Once the Union put forth a legitimate non-discriminatory reason for failing to pursue his grievance, it was up to him to raise a

genuine issue of fact regarding whether the Union's given reasons were mere pretext. *Carey v. United States Postal Service*, 812 F. 2d 621, 625 (10th Cir. 1987). It was Mr. Richardson's burden to show that the Union had treated similarly situated non-minority members differently, not the other way around. The closest we find to any allegation of racial animus is his statement that "when [] White Co-workers make a statement and [a] Black member los[es] his right[] to be represent[ed] by the Appellee that is discrimination." We assume he means the statements supporting the Albertson's letter were made by white co-workers. Interestingly, he does not challenge the verity of their statements but instead alleges the Union should have provided police reports describing the events rather than relying on the white co-worker's statements. He also does not explain how the police reports would differ from the testimony of his co-workers or provide any reasons why his co-workers might be unreliable other than the unacceptable fact that they are white and he is black.

In order to survive a motion for summary judgment the non-moving party must dó more than assert conclusory allegations and claim the moving party should have used a different source for its supporting facts. In this case, the Union has presented the non-racially motivated reasons that they dropped Mr. Richardson's grievance after he failed to cooperate with them by providing any support for his claims while faced with a letter from Albertson's providing legitimate reasons for firing him supported by several eyewitness statements and affidavits. The Union also produced numerous letters documenting its attempts to get information from Mr. Richardson about his claims, actions it had taken against Albertson's in pursuit of this claim and evidence of previous actions it had successfully taken on Mr. Richardson's behalf. The simple fact that the eyewitnesses supporting Albertson's letter are white and he is black is not enough to support a claim of racial

discrimination. We find no direct or indirect evidence that Mr. Richardson's race played any role in the Union's decision to no longer pursue his grievance.

The district court's order is **AFFIRMED**.

Entered for the Court:

WADE BRORBY
United States Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel B. Sparr

Civil Case No. 95-S-0679

ROBERT RICHARDSON,

Plaintiff,

v.

BAKERY, CONFECTIONERY & TOBACCO WORKERS, LOCAL NO. 26,

Defendant.

ORDER

This case is before the court on the Recommendation of United States Magistrate Judge Donald E. Abram that the Defendant's motions for summary judgment and for dismissal with prejudice be granted and that the Plaintiff's civil rights complaint pursuant to Title VII, 42 U.S.C. § 2000e *et. seq.*, and 42 U.S.C. § 1981 be dismissed. The Recommendation was issued on November 3, 1995 and served by mail on November 3, 1995. On November 13, 1995, the Plaintiff filed his "Answer to Recommendation of the United States Magistrate Judge." The court must make a *de novo* determination of those portions of the proposed findings or recommendations to which specific

objection is made. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b).

After conducting a *de novo* review of the proposed findings and recommendations, the court agrees that the Defendant's motions for summary judgment and for dismissal with prejudice must be granted and that the Plaintiff's civil rights complaint pursuant to Title VII, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1981 must be dismissed. First, the Plaintiff's complaint is untimely. The evidence indicates that the Plaintiff filed his complaint beyond the 90-day time limit after receiving the EEOC's determination on his charge of discrimination. Other than his conclusory allegations, the Plaintiff has provided no evidence to the contrary.

Second, the Plaintiff has failed to prosecute this case and has refused to provide adequate responses to discovery requested by the Defendant and ordered by the court on August 28, 1995. Pursuant to Fed. R. Cir. P. 37(b)(2)(C) and 41(b) and the relevant factors, Ehrenhaus v. Reynolds, 965 F.2d 916, 921 (10th Cir. 1992), the Plaintiff's complaint may be dismissed with prejudice.

Third, the Plaintiff has not established a prima facie case for discrimination under Title VII or § 1981. There is absolutely no evidence that the Plaintiff was treated differently than anyone who was similarly situated.

Fourth, the Defendant has sufficiently demonstrated a legitimate nondiscriminatory reason for abandoning the Plaintiff's grievance against Albertson's.

Fifth, the Plaintiff has not demonstrated that the Defendant's nondiscriminatory reason for discontinuing the Plaintiff's grievance was actually a pretext for discrimination. Other than the bare conclusory allegations set forth in the complaint, the Plaintiff has presented no evidentiary support for his claims. The Plaintiff did not file any responses to the Defendant's motion for summary judgment or motion for dismissal. The Plaintiff's answer

to the Magistrate Judge's recommendation states merely general conclusory denials of the Defendant's evidence.

The court now being sufficiently advised,

IT IS ORDERED:

1. The Recommendation of United States Magistrate Judge is ACCEPTED.

2. The Defendant's Motions for Summary Judgment, filed August 17, 1995 is GRANTED. Judgment on the complaint is hereby entered in favor of the Defendant and against the Plaintiff.

3. The Defendant's Motion for an Order Dismissing the Action with Prejudice is GRANTED. This civil action is DISMISSED.

Dated at Denver, Colorado this 14th day of November, 1995.

BY THE COURT:

S/

Daniel B. Sparr
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
United States Magistrate Judge Donald E. Abram

Civil Action No. 95-S-679

ROBERT RICHARDSON,

Plaintiff,

v.

BAKERY, CONFECTIONERY & TOBACCO WORKERS LOCAL NO. 26,

Defendant.

RECOMMENDATION OF
UNITED STATES MAGISTRATE JUDGE

Abram, Magistrate Judge

Plaintiff was employed by Albertsons Inc. until June 5, 1992. On June 2, 1992, Plaintiff left the Albertsons store for a lunch break. Plaintiff did not return to work until June 5, 1992. He explained that his absence was due to his long-standing asthmatic condition, for which he sought medical attention on June 4, 1992. When Plaintiff returned to work on June 5, 1992, he was asked to produce evidence of the doctor's visit. He failed to produce the requested evidence and was suspended indefinitely. On June 23, 1992, Plaintiff filed a grievance

with Albertsons regarding his suspension. The Defendant represented Plaintiff in the grievance process from June 1992 to July 1993. During this period, Defendant made repeated requests of Plaintiff to produce evidence that he saw a doctor during his absence from work. Plaintiff did not produce any such evidence. In July 1993, Defendant terminated its representation of Plaintiff. Plaintiff filed this action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, 1981. Plaintiff claims that Defendant racially discriminated against him by failing to represent him in a grievance against Albertsons.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "One of the principal purposes of the summary judgment rule is to isolate and [di]spose of factually unsupported claims or defenses." Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). On a motion for summary judgment, the court views the factual record and any reasonable inferences arising from it in the light most favorable to the nonmoving party. Summary judgment may be granted if the court concludes that, based on the record as a whole, no "rational trier of fact" could find for the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Once the moving party has come forward showing no issue of fact for trial, the party resisting a summary judgment motion must "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The non-moving party may not rest on the mere allegations or denials of his pleading and "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586.

At the outset, it appears that Plaintiff's complaint is untimely. Plaintiff filed a charge of discrimination against Defendant with the Equal Employment Opportunity Commission ("EEOC") on November 4, 1993. The EEOC found no violation of Title VII and dismissed the charge in a determination dated December 12, 1994. The determination states that Plaintiff may file suit in federal court within 90 days of receiving the determination. Plaintiff filed suit on March 24, 1995, 102 days after the date of the determination. While Plaintiff's complaint states that he received the determination in January, 1995, Defendant received it on December 15, 1994. Defense counsel has provided an affidavit of its office manager stating that the determination was received on December 15, 1994. Plaintiff, however, has not come forward with any evidence showing when he received the EEOC determination and supporting his assertion that he received it in January, 1995. See Matsushita, 475 U.S. at 586 (non-moving party may not rest on the mere allegations of his pleading and "must do more than simply show that there is some metaphysical doubt as to the material facts"). Therefore, summary judgment is appropriate in favor of Defendant.

The complaint also should be dismissed with prejudice pursuant to Fed. R. Civ. P. 41(b) for Plaintiff's failure to prosecute. Rule 41(b) provides:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision . . . operates as an adjudication upon the merits.

Rule 37(b)(2)(C) also allows the court to dismiss an action if a plaintiff refuses to permit discovery or to obey a discovery order. See Mobly v. McCormick, 160 F.R.D. 599 (D. Colo.), aff'd, No. 95-1173, 1995 WL 578987 (10th Cir. Sept. 26, 1995); Halas v. Consumer Servs., Inc., 16 F.3d 161 (7th Cir. 1994) (pro se plaintiff's employement [sic] discrimination action was properly dismissed where plaintiff failed to provide requested discovery and disobeyed court orders). In this case, Plaintiff has continued to refuse to permit discovery, thereby disobeying this Court's Order requiring Plaintiff to respond to Defendant's discovery. See Order dated August 28, 1995. This Court previously advised Plaintiff of the ramificatic of his refusal to cooperate in discovery. See Order dated September 22, 1995 ("If the plaintiff has failed to provide discovery, there is a remedy pursuant to Rule 37, if a motion is filed."). Furthermore, Plaintiff has not responded to Defendant's Motion for Summary Judgment and Motion to Dismiss. From the above actions, or rather inaction, Plaintiff's failure to prosecute this case and to obey the orders of this Court is readily apparent.

IT IS THEREFORE RECOMMENDED that Defendant's Motion for Summary Judgment, filed August 17, 1995, be granted.

FURTHER, IT IS RECOMMENDED that Defendant's Motion to Dismiss, filed October 13, 1995, be granted.

FURTHER, IT IS ORDERED that pursuant to Fed. R. Civ. P. 72(b), the parties herein shall have ten (10) days after service hereof to serve and file written, specific objections hereto. If no such objections are timely filed, the Magistrate's proposed findings and recommendations

may be accepted by the District Judge and appropriate orders entered without further notice.

DATED at Denver, Colorado, this 3rd day of November, 1995

BY THE COURT:

Donald E. Abram
United States Magistrate Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ROBERT RICHARDSON,	)	
Plaintiff - Appellant,	)	
v.	)	No. 96-1518
	)	
BAKERY, CONFECTIONARY & TOBACCO WORKERS LOCAL NO. 26,	)	
Defendant - Appellee.	)	

ORDER
Entered September 16, 1996

Before BRORBY, EBEL, and HENRY, Circuit Judges.

This matter comes on for consideration of appellant's petition for rehearing.

Upon consideration whereof, the petition for rehearing is denied.

Entered for the Court
PATRICK FISHER, Clerk

By S\
Deputy Clerk